CRIMINAL TRIAL PRACTICE

One Mans Approach

WILLIAM B. KIRKSEY, ESQ.
KIRKSEY & ASSOCIATES, P.A.
100-M Heritage Building
401 East Capitol Street
Post Office Box 33
Jackson, Mississippi 39205-0033
Telephone: (601)354-4662

CRIMINAL TRIAL PRACTICE

After thirty eight years of attempting to practice the law, I still find that each day of this life brings new information, new meaning, new things to learn. With the passage of this time I have found that the battle with the government, whether it be the state or federal, is just as fun and exciting today as when I started in 1976, although I find that I am not as scared to step into the arena of the courtroom as was then - at least I have a little confidence in what I attempt to do for the clients that I represent.

When I think about the topic of criminal trial practice I have to believe that there are basic matters that are the same regardless of whether the case is a capital murder or a DUI first offense. What I will attempt to do today is give you basic information that you can carry forward in your practice. Those of you who have heard me speak prior to today may hear some of the same information and for that I apologize, I know how much I hate to hear the same information over and over.

A. Honor in the Practice

The lesson of honor in the practice was a lesson taught to me by a lawyers lawyer that was my first partner - Alvin M. Binder. He had a simple philosophy about approaching this business. To put in the short version, it was his belief that "If you can not play the game with honor, then you should not play at all." Some of you may be thinking what does that mean? What it means ladies and gentlemen is numerous things - it begins with not ever expanding the truth into a lie, to your client, to the prosecution, to the police, to the Court, simply put to anyone with whom you deal in a case. Throughout my career I have represented Judges, Circuit, Chancery, Supreme Court. Because of these relationships they have shared their

thoughts with me and I have heard what they said. The number one complaint I would say they have is lawyers who are not truthful with the court, whether it be on and issue of discovery, request for continuances, issues of witnesses - I have heard it all. Once a reputation is gained of not being honest with the Court or the prosecutors, then you more than likely have lost the battle before you start. Gain a reputation for truthfulness and honesty in the practice, and it will open doors that are not available to others. Because I have strived to honor what Mr. Binder thought me Judges know that if I say I did not get a discovery document, then I didn't. Judges know that if I say I need a continuance then its true. Judges know if I am not at a docket call - then something is wrong with me.

About a year ago a prosecutor said this to me."Bill, you do not tell us all your clients are innocent, you do not bull about facts that exist - so on those few occasions that you tell us that a case isn't right, there is something wrong here, we listen to you." This is opposed to the lawyer that is always telling a prosecutor that all clients are innocent and attempt to bully the prosecutors - The facts of all cases are made before we get involved, all we can do is work with, weave if you will the facts in the best light for the client - the truth is the truth, nothing more or less is our fidelity to the practice. A lawyer that lies damages his reputation, his case, and ultimately the client. Being honest with ones self, the others in this system, will ultimately open doors to you - otherwise they get closed in your face.

Along this same line of inquiry is "leave it inside the rail." Inside the pit of the courtroom all is fair and the battle to save the client from the jail is the ultimately game to be played. Civil practitioners know they deal with issues of money - We in the criminal law business deal with lives- lateral life if it is a capital case, otherwise years of jail are in

question. But a good lawyer knows that what happens inside the rail stays there, never take the heat of battle outside of that rail. Or as I say if you do not have the temperament to leave it there, then you should not step into the arena at all.

B. The Client

Most of my client come to me by referral from other clients, word of mouth, and other attorneys - many have been sent to me by Judges and Prosecutors. My advertising is limited to my number in the yellow pages. Over the years I have represented hundreds of the citizen accused who have been charged with crimes of all types. It has been my fate to usually represent the hard cases, the notorious cases, the high profile cases, but whatever the case, they always start the same - with the interview. I have attached a copy of my interview form. I have found over the years that this supplies the basic information. I also have in recent years got the client to write me a detailed story of the facts. In all my felony cases I use a contract, which establishes the relationship with the client as for as what I will do and what their responsibility will be - payment and otherwise. In a criminal case it is best to be paid up front - if you win they love you, lose and you will never be paid. According to the bar you can not have a "non refundable retainer." You can however have a non refundable minimum fee. Contracts protect you as well as the client. Further in a dispute over the fee, the bar will rarely get involved if you have a contract in writing. So do a contract with your clients. Never sale short the fact that you are using your skills, your knowledge, your relationships with Judges and Prosecutors in establishing the fee.

At the initial conference the facts of the case from your clients prospective are learned. I have found it is easier to defend a guilty client than an innocent one. The guilty client knows the facts better than the police, the innocent one just whines and is confused about why they are in trouble. Whatever the case at this first meeting I try to establish the rules of the game, the facts of the case, tell the client maximum exposure, and never, ever, tell the client an ultimate outcome. Any attorney who does express an opinion at this early point is just lying to the client. I attempt to find the "handle" if you will for the case, the defense that will drive me forward with my actions as a lawyer. From the first day to the last of a case the decisions made at the first interview will usually control what may happen in the case.

C. The Facts/Evidence

Each case whether it be a murder or a DUI has its own unique facts that will be established by the evidence in the case - know the facts, know the evidence. Over the years I have come to understand that your chances of winning are increased in direct proportion to how well the facts are known, how well the technical application of them are managed. In many cases you have to learn to be an expert in the field. You may have questions of fingerprints, DNA, fiber, blood spatter, etc. On these occasions it is wise to become your own expert in the field - read the treatise, read the FBI manual, read about autopsies, read about ballistics and trajectory, powder burns, etc. Only by doing this do you understand the facts and have an ability to effectively cross examine the experts. In the 90's when DNA was first being relied upon by prosecutors many defense attorneys did not understand the how and why of this evidence, and thought if DNA was involved it was a losing case. In an effort to

not be one of those, I attended a three day symposium in Washington, D.C. hosted by the NACDL where I listed to Barry Schick and Peter Newfield about the voodoo magic of DNA. I came back to Mississippi and applied what I learned to the facts of the cases involving DNA and learned what to look for, how to cross examine, how to confuse the issues, how to show a jury that it was not what it appeared to be. Because of this I won cases that would have otherwise been lost. The ability to be able to learn a field and become a mini expert is required to properly do the job of defending the citizen. Know the facts better than your opponent and your ability to control the courtroom and the case increase dramatically.

D. Master the Courtroom

When I first started practicing in Batesville, Mississippi, we had two terms a year, February and October. The Grand Jury came in on Monday and indicted people, Judge Dick Thomas had arraignments on Tuesday, and appointed attorneys, and you went to trial on Wednesday, Thursday, or Friday. That is how I started. When I came to Jackson in April of 1977, I found myself being sent to different places and States to try cases, Alabama for a school book theft at a college, Delaware for a embezzlement case, U.S.District Court for a doctor giving drugs to young women for sex. I was scared to death, but I survived. Many years later a client of the firm told me he asked Binder why he was sending me- the youngest lawyer. To this Binder replied "because he has already learned Judges put there pants on just like we do, and he is not intimidated by them or their robes."

Judges are the mediator's of the case, if you will. You and the prosecutor on the case are the players. The Courtroom is just a room, the jurors are just people, witnesses are

usually biased one way or the other. Last year a Chris and I were walking to Judge Will's Court to defend a JPD officer on charges of bribery. As we approached the door I turned to her and said, "This is my playing field, I own it and it is mine." That is how I approach the Courtroom - I am determined to know more about a case than the prosecution, know more about the rules than them, and to let the jury know that I am in charge. I may do it with objections and argument. I may do it with a spat with the Judge, I may do it with a speaking objection that lets the jury know that the prosecutor is wrong on the rule, a statement, whatever, but in some way I attempt to get the jury to listen to me, not the judge, not the prosecutor. I also do this I believe by not objecting each and every time that I could. I never want the jury to think I am hiding something - to the contrary I want them to believe that I want them to hear it all, that I have nothing to hide, let it all come in - I will still beat them if I can.

Prior to trial on any case you should attempt to know what questions on the evidence will come into play during the trial. Know the rules better than your opponent. Have your rules book ready - whether it be an issue of discovery, or admissibility be ready to cite the rule with authority - and remember an objection without a basis is nothing at all.

E. Motions

The use of motion practice is important in any criminal case. There may be issues involving the indictment, searches, statements made by the client, in limine matters, insanity, alibi, competency. The use of motions is a tool that is often overlooked by many attorneys. I have found over the years that the use of motions is beneficial to learn about a case early, and the use of motions sometimes forces the prosecutor into a position of making an offer

that they would not otherwise make.

When drafting a motion that involves a Constitutional issue never forget to include the like guarantee in the Mississippi Constitution of 1890. On more than one occasion our Supreme Court has resolved cases on the basis of our Constitution, not the Federal one.

I have heard over the years attorneys state they would have filed a motion to do X, but did not think it would go anywhere so they did not file it. My position is simple - you never know until you try. Do not abandon a position based solely upon questions of whether the Court will grant a given motion or not. All cases are handled by the attorney for the actual trial on the merits and for the record on appeal. What a circuit court may do, may not be what the Supreme Court may do. Never abandon a position that you believe has merit, but also do not file frivolous motions either, at least have a basis for what you are asking a court in a given case.

F. Voir Dire

Voir Dire is the first opportunity that a lawyer has to speak to a jury panel. During this process, it is also the first opportunity for the jury to listen to and assess the attorney, his case and his client. The most important people in the Courtroom are the potential jurors. Never lose sight of this proposition.

The purpose of voir dire is to attempt to select the best possible juror for your jury on a particular case. The effective trial attorney can use voir dire to legitimately accomplish these objectives: (1) Eliminate biased jurors; (2) Seek as much information as possible about the individual jurors to work toward the most favorable jury possible; (3) Establish a rapport for himself and his client with the jury; (4) Give the jury a favorable impression of his case

and defuse the opponent's case as much as possible. Although you cannot go too far or be too argumentative, a skilled attorney can accomplish each of these objectives within the bounds of legitimate voir dire.

The appearance of the attorney is important. If you go to court looking sloppy with no collar stays, dirty ties, rumbled suits, unkept hair, and the jury will start their opinion of you and your case the same way. Look and act professional, with an air of success, knowledgeable, and prepared and the jurors pick up on this. Jurors are immediately attracted to the lawyer who appears prepared and confident. It is appearance, not the reality that counts at this stage. They will be watching you as you watch them. Your appearance is important from the beginning of the case. If the Court qualifies the jurors at 8:30 a.m., then be there at 8:15 a.m., be seated at counsel table - with your table organized and neat. In doing this the jury sees you early, knows that you are there to do your job, and that you care about their answers in the general qualification. Many lawyers do not appear for this process, since it is not required. The ones that are there have a one up on the attorney who appears later.

Be prepared - knowing your case early and thinking ahead about the type of juror you want starts when you start the case. Murder/self defense, What type juror? Sexual battery, What type juror? Rape, What type of juror? Physical evidence, circumstantial evidence, lab reports, experts. All these situations require the attorney to think about the potential juror for a particular case.

In approaching the issue of voir dire, defense counsel must decide and list those questions about the case that will be known facts before he even starts the questioning

process. These shall be referred to as core questions. Core questions are illustrated by the following, but these are not meant to be exhaustive in nature:

1. Is the defendant white or black?
2. What was the felony?
3. Was it an interracial crime?
4. What is the prior record of the Defendant?
5. Does the Defendant intend to testify?
6. What is the defense?
7. Was the crime especially brutal?
8. Is the client an habitual offender or does he qualify?

The above list to some may seem to be just that, a list. But when examined with the thought of picking a jury for the defense, it becomes an all important first checklist, if you will. From this list you are able to answer basic questions about the type or non-type of person you want on a jury. You also are making the initial listing on whether or not there will be a Batson issue, whether you want men or women, blacks or white.

You also need to know your defenses and what you would be looking for in this area in way of potential jurors. Only after examination of the basics and making the decisions brought about by this list, should you go on to the decisions regarding the particular questions that are to be asked by the defense counsel. You have to ponder long and hard on your case, its strengths and weaknesses. Consider the types of jurors that would be likely influenced by both the strengths and weaknesses of the case. Consult outside source materials, consult lay friends, those with attitudes and opinions of typical jurors. Questions

to the jury must not be structured, but come out naturally and not be rehearsed. Jury selection will always be guess work, it is the good lawyers job to strive to make it the most intelligent guesswork possible within the framework of a given case.

It is essential in establishing rapport to convey sincerity and empathy. This is done in large measure by tone, eye contact, and demeanor. Juries like the lawyer who is a sincere gentleman or lady. Not pompous or arrogant; not self-righteous, just plain sincere, genuine and honest. Don't talk down to a jury, don't use a lot of legal jabber. Any case including the voir dire process is telling a story - talk to the jurors in plain language - talk to them the way you would want to be talked to.

More than half of all jury pools are made up of people who have never served on any type of jury - civil or criminal. They will come into the court with all the natural fears of being in a new place, new surroundings, doing something they have never down before. They may not be use to talking in public. They come into the courtroom with all their accumulated experiences of life, and these things affect their ability to be the best jurors in any given case. Your job as a lawyer during voir dire is to make them feel at ease, get to talking - explain to them that if they feel uneasy about any question, they can answer at the bench. Find a potential juror that you know will talk about something - military background, teaching school, what grade - married to a policemen, would you believe him? Get the flow between you and the jury going - make light of something, joke a little if you will - but put them at ease in the courtroom, and they will respond to the questions. Once one or two jurors talk in front of the group on a "comfortable" subject, you have gotten your voir dire off into the casual conversation mode, and out of the "courtroom mode." In this mode the

juror is much less likely to feel like he or she is being cross examined by the lawyer, and just talking to another person.

The form of questions are also critical to getting accurate, honest answers from the venire. Questions should be somewhat broad and open ended, but not wide open. Jurors seldom respond to questions that are too board. Questions that are to closed ended leave the juror little response except a yes or no. Closed ended questions are appropriate and important when a juror has evidenced prejudice and the attorney is trying to insure that the juror will be stricken for cause and cannot be rehabilitated. Never use the word bias or prejudice. People in general will never admit such as a rule, but questions can be formulated to expose bias and prejudice.

Rule 3.05 of our Uniform Criminal Rules of Circuit Court Practice provides,

> In the voir dire examination of jurors, the attorney shall direct to the entire venire only on matters not inquired into by the court. Individual jurors may be examined only when proper to inquire as to answers given or for other good cause allowed by the Court. No hypothetical questions requiring any juror to pledge a particular verdict will be asked. Attorneys will not offer an opinion on the law. The court may set a reasonable time limit for voir dire.

In other words all questions have to be addressed to the general panel, with individual questions being limited to follow up on something asked by the Court, counsel opposite, or from the jury form given to you prior to Court. A sample of general areas that should be covered on voir dire is attached. Voir dire is not to be used as an opening statement pursuant to the above rule, however the Court will have already told the potential jurors a little about the case. You as the lawyer can expand on this as much as you may, as long as the other side does not object - a silent opponent is sometimes your best friend during this process. If there

is not objection forthcoming, use the questions, the time to educate your jurors to the case and when your position is the correct one as opposed to your opponent's. The defense attorney must prepare well in advance of trial to be able to adequately plan and complete the all important task of voir dire. There are many in the profession of law that believe any case is won or lost at this stage. Decide upon the core questions, and arrive at your desires and needs prior to attempting to prepare your voir dire, outline the constitutional amendments that pertain to any capital case, have your objections ready with current case law, and remember to always place the tone, demeanor, and context of your questions on the level that your prospective jury can understand.

G. Opening Statement

The opening statement by the Defense is the second opportunity you have to address the jury directly. By this point there should have been a rapport built during voir dire. The State has told the jury what they believe the evidence will establish during the trial. During the State's opening take notes on what they say, because at closing if they fail to prove up a point you can always mention it to the jury. Now its your turn to tell the jury what the evidence or lack of evidence will be in the case. Opening is a story, your story about the case. I try not to use words such as "I believe the evidence will show"- In this case you will hear or see the following is much simpler and the jury does not have to think about evidence - it is just your story coming across. At this stage you want the jury to think about your case, not the prosecution's. If the case has been sloppily investigated and there should have been certain matters sent to the crime lab, then tell the jury - Because of sloppy police work you will not hear any testimony about the blood at the scene being Mr. Smith's. Since there was

no GSR done, their will be no testimony that Mr. Smith fired a gun. Because Mr. Jones was never properly interviewed we will never know who he saw running from the scene.

To this day I normally write my opening out to cover the areas I need to cover. I then practice that opening. A lawyer that can stand in front of a jury and tell the story without looking at his/her opening is exhibiting knowledge to the jury - never read an opening statement.

H. Direct and Cross Examination

Each attorney develops his or her own style of examination of witnesses, whether it be direct or cross. The technique used is as individual as ones own fingerprints, but whatever the style or technique fundamental principals apply.

For each witness that is going to be examined there should always be a list of questions or topics that you desire to bring out through the witness. On direct examination each witness that you are going to put on the witness stand should have been (1) interviewed and (2) Questions prepared for that witness and asked of him/her. I attempt to have each witness tell me their story and then craft my questions from that story so there will be no "unknowns" to the witness.

In the event a defendant is going to testify I prepare detailed questions and proposed answers for the defendant, then I spend hours with that person "getting their story down." I also cross examine my client so that they will be prepared of anticipated questions by the State in the areas that may be a problem for the defense.

Remember that any question that requires a yes or no response is leading, and this may bring about an objection by the State. Most of the time when there are foundation

questions there will be no objections, but on issues of merit you can always anticipate the objection coming. The following is illustrative of the question process. "Do you know where you were on the night of June 15?" - leading vs. "Where were you on the night of June 15.?" - non leading.

About 37 years ago Mr. Binder and I were defending Ed Ratliff, the dirty Harry of the Jackson Police Department, on four counts of burglary. He walked into my office one day and said " prepare cross examination questions for the state witnesses." I thought about this and asked him how I could do this without knowing what the witness may say on direct. That day was the day I learned that you go through each statement, each offense report, each lab report, whatever the case may be and prepare ahead of trial all questions in the areas that may help your defense that you want to ask the witness from what you have been given by the State, whether it be differences in statements given, or what type of weapon is used - i.e., pencil vs. knife. After you have done the list of questions of what you know you want to cover, what is said by the witness from the stand will add to your list of questions.

Cross examination is critical to your case and should be approached methodically and with the precision of a surgeon. It is usually where you knife is struck into the State witnesses, slowly turned, leaving a bloody hole in the witness and the State's case. Be prepared ahead of time.

Direct examination should be approached in the same manner as the cross, except this is where you want to put your case on. Anticipate bad areas for your witness and bring those out yourself - when you do it is covered and you move on, you appear to the jury as not holding anything back. For example you have a witness on the stand who has been convicted

of a felony-go ahead and bring it out, do not leave it to the State to do.

Each examination is unique to that person. I had to cross examine a five year old boy a couple of years ago on a sexual battery case. Through researching papers on the subject of questioning children I came across a paper that discussed how children are not as relaxed around people bigger than them - I wanted this kid to be relaxed - so when I crossed him I took a chair and set in front of the witness stand, lower than him, looked up at him and asked him questions. I got what I needed from him, and we received a not guilty verdict.

I. Closing Argument

In the scheme of the American justice system due to the burden of proof the State goes first and last during closing argument, with the defense plugged in the middle. What is said to the jury at this final time to talk to them is your last chance to relate the evidence to your theory of the case. Closing must be such that the jury remembers it in the jury room in spite of what the D.A. says to them in the final half of their closing. Remember during closing to point out to the jury whatever the State said on opening that they failed to prove-it is an example of the weakness in the case. Remember to use jury instructions that are helpful to your case in your closing.

If two lawyers have defended a case, then in a lot of instances the closing is shared. If this is the method used, then each attorney should decide what is going to be covered by which attorney, so that it is not repetitive - One may do the facts of the case, what the evidence has shown, the other close with mom and pop, and the American Flag - I have a apple pie closing that I have used over the years when another lawyer is doing the facts.

Whatever you say in closing should tie into your opening. What you told them in opening should have been proven, what you say to them in closing should wrap it up if you will. As with opening closing should be written out, practiced and spoken from the heart. Reading closing, other than jury instructions, or a part of a statement, or other evidence will kill you in front of a jury - Speak again with authority and with feeling-close your case to them with your high points, and tell them it will be the last time to talk to them about John Q. Public, ask them to remember what you have said, and that their verdict should be returned in your favor.

Conclusion

The lessons learned in the life of a trial lawyer continue daily. Each time I walk into a courtroom for a criminal trial, I am nervous, each time I am worried. At the close of a case I am concerned that I did not do enough, did not work hard enough on the case, did not do things I should have done. In this paper I have attempted to give some tidbits of information learned the hard way - during the battle. Each of you may only remember one thing I have conveyed to you, but it may help you win.

Remember we are liberties last champions, we defense lawyers are the only thing standing between the citizen accused and the majesty and might of the governments of our country. Fighting the fight, defending one's rights as guaranteed to them by our Constitutions has been an honor and pleasure for me over my lifetime as a lawyer. I hope to continue to be in the pits of the battle, and fight as long as God gives me the ability, and do so with honor and humility - with deference to my oath as an attorney.

Sample areas to cover in Voir Dire

1. Members of D.A. staff
2. All witnesses for the State
3. Victims of crime
4. The indictment, meaning of
5. Who has had military service
6. Government employees
7. Members of law enforcement and relatives
8. Testimony of law enforcement
9. Presumption of Innocence
10. Burden of proof
11. Eye Witness testimony
12. Testimony of Experts
13. Elements of the crime
14. Press and pretrial publicity
15. Attitudes toward defendant
16. Knowledge of the victim
17. Relationship of homes to crime or victims home
18. Keeping an open mind
19. Instructions, following the law
20. Silent defendant or testimony of defendant
21. Interracial crimes
22. Violent acts-description of crime
23. Evidence rules that apply
24. Commitment to ones own verdict
25. Personality contest between attorneys
26. Professions of the jurors
27. Questions about areas known to be involved in the case, i.e., drugs, psychologist, religion, etc.

Death Penalty

1. Nature of the Penalty
2. Personal beliefs
3. Two steps to the trial
4. Both stages voir dire at once-No indication of guilt
5. Alternative verdicts, lesser included offenses
6. Explain guilt and sentencing phase
7. Explain Mitigation
8. Aggravating factors
9. No one will instruct on what verdict has to be
10. Questions under With/Adams
11. Reverse Witherspoon questions
12. Verdict is own personal decision